UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PAUL J. MURPHY, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

CIVIL Case No. 3:17-MC-00004 (TJM)(ATB)

CAYUGA MEDICAL CENTER AT ITHACA, INC.

Respondent

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF NLRA

Jessica Noto, Counsel for Petitioner
Alicia Pender, Counsel for Petitioner
Caroline Wolkoff, On Brief

I. Preliminary Statement

Petitioner submits this Reply to Respondent's Opposition to the Region's Petition for 10(j) Relief to clarify certain misleading characterizations of fact and law. While Respondent seeks to create issues of fact about why it terminated union advocates Anne Marshall and Loran Lamb, the law is clear that a court must defer to the Regional Director's conclusions unless they are fatally flawed. The record offers ample evidence supporting the Regional Director's findings and, in fact, belies Respondent's version of events. The record shows Respondent terminated Marshall and Lamb for their union activity, not because they checked blood for a transfusion at the nurses' station instead of the bedside. It is replete with examples of Respondent choosing to stand by its nurses when they deviated from policy and even made medical errors, with the notable exception of Marshall and Lamb. Respondent thus relies on a false dichotomy of patient safety versus collective bargaining rights. The variable that led to Marshall and Lamb's terminations was not that they presented a greater danger than the nurses Respondent has stood by – the record is clear they did not – but Respondent's animus toward their union activity.

II. Petitioner Seeks 10(j) Interim Relief Based on Available Administrative Record

Petitioner maintains Respondent is a recidivist employer that has committed hallmark unfair labor practices. It has, therefore, asked for 10(j) relief based on the existing administrative record, supplemented by affidavits. Contrary to Respondent's characterization, Petitioner does not ask the Court to wait until after the hearing is complete and the parties have addressed the record through briefs to the ALJ.[1] Rather, it seeks 10(j) relief as soon as practicable.

The existing administrative record provides a robust basis for evaluating the need for 10(j) relief. The General Counsel rested its case in chief on March 10. The hearing is scheduled to reconvene on April 3 and to conclude the following day. The Court need not wait for the

[1] *See* Resp.'s Opp. at n.1; *see also* Resp.'s Mem. of Law/Answer to Petitioner's Mots. at 1.

hearing to close to make a decision, however, let alone for completion of time-consuming briefing thereafter. Such delay would run counter to the purpose of 10(j) to provide expeditious interim relief to preserve the Board's final remedial authority. No requirement exists that, once the record opens, a petitioner must wait for the completion of the administrative proceeding to seek interim remedies.[2] Section 10(j) does not contemplate a full adjudication of the underlying case, but simply an evaluation of whether the petitioner has shown "reasonable cause" that an unfair labor practice occurred. *See Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131 (2d Cir. 2013*); Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360 (2d Cir. 2001); *Kaynard v. Mego Corp*., 633 F.2d 1026, 1032-33 (2d Cir. 1980). For that reason, a petitioner may base its request on affidavits prior to a hearing on the merits. *See Red & Tan Lines, Inc.*, No. 98 CIV. 8247, 1999 WL 1140871 (S.D.N.Y. 1999). Here, the Court will have affidavits as well as the record of the General Counsel's case in chief. Certainly, the existing record provides a more fulsome basis than affidavits alone to ascertain whether "reasonable cause" exists.

The fact that Respondent has yet to complete presentation of its case does not mitigate in favor of delay. Courts may not make credibility determinations in assessing the need for 10(j) relief. *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051-52 n.5 (2d Cir. 1980); *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 36-37 (2d Cir. 1975) (stating deference to Regional Director's conclusions required if "within the range of rationality"). Moreover, Respondent has had a full opportunity to cross-examine the General Counsel's witnesses, an opportunity it would not have had if the petition were based on affidavits alone. Respondent, therefore, will suffer no prejudice

[2] Respondent's cases do not establish a rule that a court must wait for a complete administrative record. Neither court explains why it decided the 10(j) petition at the stage it did, though it was presumably appropriate given the state of the record in those cases. *See, e.g.*, *Dunbar v. Colony Liquor*, 15 F. Supp. 2d 223, n.13 (N.D.N.Y. 1998) (noting delay was due to petitioner's failure to provide support for petition, necessitating petitioner's request to base decision on complete record). Here, the record provides ample evidence upon which to base a decision.

if the Court bases a decision on the existing record. The Court, however, will have the benefit of a fully developed and cross-examined record of Petitioner's "reasonable cause."

III. The Record Contradicts Respondent's Account and Supports Reasonable Cause

Respondent's Opposition seeks to establish factual dispute at every turn – no matter how greatly its version of events departs from the facts on the record. However, as the record supports the Regional Director's conclusions, the court must defer to that version of events.[3]

Petitioner has submitted significant evidence of reasonable cause that a violation of labor law has occurred. It has submitted an ALJ decision that establishes Respondent's animus toward union activity in general and Anne Marshall in particular.[4] That decision demonstrates that Respondent is a likely recidivist, an employer with a history of numerous labor law violations, including retaliation against one of the instant discriminatees. Petitioner also relies upon and will shortly submit the record of its case in chief in the underlying hearing. That record supports the conclusion that Respondent terminated Marshall and Lamb for their union activity. It establishes that reasonable cause exists to believe Respondent's stated reason for terminating Marshall and Lamb is pretextual. The nurses uniformly testified that it was not the practice in the ICU always to check blood at a patient's bedside. They even informed Respondent of this fact when questioned during Respondent's investigation. Yet Respondent terminated Marshall and Lamb despite standing by nurses committing more egregious errors.

---

[3] A district court "need not make a final determination that the conduct in question is an unfair labor practice." *Inn Credible Caterers*, 247 F.3d at 365. "It need only find reasonable cause to support such a conclusion. Appropriate deference must be shown to the judgment of the NLRB and a district court should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed." *Hoffman v. Polycast Tech.*, 79 F.3d 331 (1996).

[4] Although exceptions to the ALJ's decision are pending, *see* Pascucci Aff. ¶ 9, the Second Circuit has held that an ALJ decision is a "useful benchmark" for evaluating the strength of a Regional Director's theories. *Bloedorn*, 276 F.3d at 288 (citing *Inn Credible Caterers*, 247 F.3d at 367). ALJs evaluate cases based on a higher "preponderance of the evidence" standard.

Moreover, the administrative record contradicts the version of events that Respondent has proffered. For example, the record establishes that Respondent did not conduct a "thorough multilayered investigation." *See* Resp.'s Opp. at 1. The record shows that Respondent relied entirely on the patient's account of events and did not speak to Marshall or Lamb about the incident until after it decided to terminate them. The record also establishes that Respondent ignored the evidence it gathered about the practice for checking blood in the ICU. All four nurses questioned by Respondent stated that they sometimes performed transfusion checks at the nurses' station rather than at the patient's bedside, contrary to the written policy. Several additional nurses testified to this fact at the hearing. In the face of these accounts, little weight should be afforded Respondent's representation that the incident reporting system revealed no reported violations of the bedside check procedure.[5] At best, the absence of such reports shows, simply, that the policy had not previously been enforced. Respondent ignored this possibility in deciding to terminate Marshall and Lamb, even as other nurses represented it to be the case.[6] The Regional Director, however, reasonably concluded based on this evidence and Respondent's history of unfair labor practices, including retaliation against Marshall, that Respondent enforced the policy for the first time as a pretext for ridding itself of a union organizer and supporter.

To make the outcome of the investigation appear unbiased, Respondent states that the decision to terminate Marshall and Lamb was partly based on the recommendation of Dr. Sudilovsky, Chairman of Pathology and Laboratory Medicine. However, record evidence shows that in 2012, Dr. Sudilovsky's sentiments mattered little to Respondent. In 2012, Dr. Sudilovsky

[5] *See* Respondent's response, Ames Aff. ¶ 22.

[6] Respondent represents that Marshall and Lamb acknowledged they violated policy. The record establishes, however, that Lamb told Ames that nurses did not always follow the policy. The record also shows that Marshall stated she did not remember the policy and believed all ICU nurses sometimes checked blood at the nurses' station. Marshall only acknowledged deviating from policy in response to Respondent's recitation of the policy to her.

expressed displeasure at the "band aid" approach to dealing with an instance in which three nurses deviated from procedure, leading to the wrong blood being hung for a transfusion.[7] In that case, two of the three nurses received no discipline. The only nurse who parted ways with Respondent did so prior to the completion of the investigation into the incident and had previously been counseled for, among a litany of other things, diverting narcotics, falsifying and failing to document patient records, and overdosing a patient on narcotics. Indeed, Karen Ames, who later led the investigation into Marshall and Lamb, said in an email about the 2012 incident, "I do not want them [the nurses] feeling beaten up," adding, "from the info I was given it did not appear this was a breakdown in processes but rather deviation from policy and procedure in place." She further noted, "I promise I will not allow blame etc. We need to move forward." In stark contrast, the record here shows that Ames had no problem attributing blame to Marshall and Lamb when they deviated from policy without causing patient harm.[8]

Such evidence gives the lie to Respondent's claim that 10(j) interim reinstatement would elevate collective bargaining rights over patient safety. The fact is, Respondent has never before elevated patient safety to the degree it has here when a nurse failed to follow policy to no ill-effect. The record abounds with examples of Respondent failing to punish, let alone terminate, nurses for near identical and more egregious deviations. The 2012 incident, described above, is one such example. In addition, the record shows that Respondent did not discipline nurses who committed actual medical errors, including a recent incident in which a nurse failed to notice a transfusion reaction despite a policy to check on a patient after a transfusion and another incident

[7] Ames attests that the bedside check saved the patient in the 2012 incident. Ames Aff. ¶ 14. However, the record demonstrates an error was avoided because the nurse acting as courier for the blood alerted the nurses after the blood was hung, but before the transfusion began.
[8] There is no dispute that, unlike in the 2012 incident, Marshall and Lamb hung the correct blood and had no disciplinary history.

in which a nurse failed to prime blood tubing and pre-medicate a patient prior to a transfusion. In the latter incident, the nurse signed to indicate she had followed procedures for priming the tubing and pre-medicating the patient, yet Respondent never alleged she falsified records. Evidence adduced during the General Counsel's case in chief also shows that Respondent did not discipline nurses who gave the wrong medication to a pre-operative patient nor another nurse who hung – and in fact started delivery of – the wrong infusion fluid for a patient. Both deviated from established policy and procedure in making these medical errors. Despite its lax approach to disciplining nurses who deviate from policy – even in cases resulting in actual medical error – Respondent would have the Court believe that patient safety alone motivated its decision to terminate Marshall and Lamb. The record provides a sound basis to support the Regional Director's conclusion that union activity was the variable distinguishing Respondent's treatment of Marshall and Lamb from its treatment of other nurses it has stood by.[9]

Respondent cites the status of an NYSED report as evidence that it terminated Marshall and Lamb for lawful reasons. Putting aside momentarily that no causal relationship exists between Respondent's motivations and NYSED's decision to refer the report to prosecution, NYSED has made no decision on what penalty, if any, would be suitable. Marshall and Lamb still have their nursing licenses and are eligible to work as nurses. NYSED has not precluded Lamb from remaining employed as a nurse, nor Marshall from seeking employment in her profession.[10] Moreover, NYSED's internal processes are not dispositive of *why* Respondent

[9] Respondent cites one termination as comparable. Ames ¶ 23. Ames attests a nurse was discharged for failing to perform checks before administering medication. The nurse engaged in more egregious conduct. She was in charge of a patient in the adolescent behavioral health ward. The patient's parent had refused consent for a class of drugs. Ignoring this directive, the nurse obtained a drug in that class for the patient under a different patient's name. *See* Ex. 13a.

[10] In the unlikely event they lose their licenses, any order of reinstatement will, of course, be moot.

fired Marshall and Lamb. Other nurses have kept their jobs with Respondent despite having "falsified" records, deviating from policy, and even committing serious medical errors. No evidence exists that Respondent reported any of these incidences. Evidence exists, however, that union supporters Marshall and Lamb were fired when others in similar circumstances were not.

Petitioner has, therefore, sustained its burden of showing reasonable cause that an unfair labor practice occurred. Respondent's effort to create factual dispute fails under the standard of review for issuing 10(j) relief, which does not contemplate a district court resolving factual disputes or making credibility determinations. While a court is, of course, no mere rubber stamp, the Regional Director's conclusion about this recidivist employer's motivation is far from "fatally flawed" given the administrative record.

IV. Respondent Misrepresents the State of the Union Campaign

Despite Respondent's characterization otherwise, the organizing campaign is far from alive and well.[11] Strong evidence of chill exists, rendering interim relief under 10(j) just and proper. As Petitioner's affidavits demonstrate, employees are fearful of openly supporting the Union. For example, registered nurse Cheryl Durkee avers that, despite continued interest, meeting attendance has declined and employees have expressed their fear to her of becoming involved with the Union. *See* Durkee Aff. In her affidavit, Durkee attests to her own fear of being retaliated against. Contrary to Respondent's contention that Durkee has assumed leadership of organization efforts, Durkee asserts that is not the case. She has not set up a table to distribute information since Marshall's termination, nor has she posted a pro-union flyer.[12]

[11] Respondent also argues the campaign is long dead. Resp.'s Opp. 21-23. It is unclear how both characterizations can be true.

[12] Durkee denies being a union organizer, despite Respondent's representation. Also, the picture Respondent provided of Durkee tabling for the Union is not recent, as Respondent represents. It was taken July 9, 2015, prior even to the first unfair labor practice hearing.

Affidavits from other nurses corroborate Durkee's account. They and their peers are afraid to participate in unionization efforts since Marshall and Lamb's firing.

Further, to the extent Respondent alleges union support dwindled prior to Marshall and Lamb's terminations, this case must be viewed in the context of Respondent's prior unfair labor practices. Respondent, as a recidivist employer, should not benefit from earlier conduct that effectively instilled fear in its employees. Indeed, these employees were right to be afraid, as the Regional Director has reasonable cause to believe Respondent went on to commit the hallmark unfair labor practices at issue here. Section 10(j) relief is, therefore, just and proper.

V. The Petition for Injunctive Relief Remains Timely and Necessary

The passage of a few months' time has not nullified the need for interim relief. Only four months have passed since the underlying charge was filed. Courts have affirmed the issuance of interim relief despite far greater delay. *See Overstreet v. El Paso Disposal*, 625 F.3d 844, 856 (5th Cir. 2010) (involving 19-month delay); *Gottfried*, 818 F.2d at 495 (involving eight-month delay); *Muffley v. Spartan Mining*, 570 F.3d 534, 544 (4th Cir. 2009) (involving 18-month delay and noting "[c]omplicated labor disputes like this one require time to investigate and litigate"); *Hirsch v. Dorsey Trailers*, 147 F.3d 243, 248-49 (3d Cir. 1998) (involving 14-month delay). Even extreme delays may be justifiable under the right circumstances. In *Bloedorn*, for example, the court ordered a successor employer to reinstate employees under Section 10(j) more than two years after the successor assumed ownership of the company. 276 F.3d 270, 299 (7th Cir. 2001). In Region 3 alone, courts have issued 10(j) injunctions after far more time passed than has in this case. *See, e.g., Ley v. Wingate of Dutchess, Inc.*, 182 F. Supp. 3d 93, 105 (S.D.N.Y. 2016) (issuing 10(j) relief although 17 months had passed since filing of charge); *Dunbar v. Colony Liquor*, 14 F. Supp. 2d 223, 227 (N.D.N.Y. 1998) (issuing 10(j) relief though 14 months passed).

The cases Respondent cites are readily distinguishable. One involves a request for relief under Section 10(l), which relates to secondary boycotts, rather than Section 10(j). *See Silverman v. Local 3, IBEW*, 634 F. Supp. 671, 672 (S.D.N.Y. 1986). Though months had passed since the filing of the charge in that case, the Region had yet to issue complaint. *See id.* In another of Respondent's cases, the alleged violation was distribution of leaflets. *See McLeod v. Art Steel Co.*, 1971 WL 783 (S.D.N.Y. 1971). Understandably, the court held such conduct was not severe enough to warrant an injunction, especially since the petitioner offered no indication Respondent would repeat this relatively minor offense. *Id.* Similarly, in another case Respondent cites, the court never reached whether a six-month delay militates against issuing 10(j) relief, finding instead that just cause did not exist because there was no evidence of an organizing campaign prior to the employee's discharge. *See Paulsen v. CSC Holdings, LLC*, 2016 WL 951535 (E.D.N.Y. 2016). While the court in *Seeler v. H.G. Page* admittedly decried a four month delay, it also noted that, during the intervening period, Respondent had offered reinstatement to strikers it had refused to take back. *See* 540 F. Supp. 77 (S.D.N.Y. 1982). Here, Respondent's employees have not benefited from a similarly reassuring gesture; Respondent's animus toward unionization and the chill resulting from Marshall and Lamb's terminations remains strong. Finally, the court in *Moore-Duncan* based its decision to decline the issuance of interim relief on other factors, not the Region's delay in seeking relief, noting merely that the Region had not explained its delay and that "a better practice" would have been to offer an explanation to the court. Petitioner readily explains that its four month delay stemmed from the desire to present the court with the administrative record of its case in chief, which constitutes the best evidence of what happened. At all times, the Region has diligently investigated and litigated this matter. Courts have routinely recognized that the Board "cannot operate

overnight," but "should have time to investigate and deliberate" before seeking interim relief. *Maram v. Universidad Interamericana*, 722 F.2d 953, 960 (1st Cir. 1983). The Region timely investigated, issued complaint, obtained an expedited hearing schedule, and developed a record before filing its petition. Thus, the Region has not unduly delayed seeking 10(j) relief.

Nor has the passage of time obviated the need for an injunction. *Gottfried*, 818 F.2d at 495 (noting that delay is a significant factor in assessing the need for 10(j) relief only when such relief cannot return parties to status quo, rendering final Board order as effective as interim relief); *accord Aguayo*, 853 F.2d at 750; *Bloedorn*, 276 F.3d at 300. Here, the passage of time has not yet "so weakened the Union that even interim relief could not salvage it." *Arlook v. S. Lichtenberg*, 952 F.2d 367, 374 (11th Cir. 1992). As Petitioner's affidavits reveal, many employees remain interested in organizing, but are cowed by Respondent's conduct toward Marshall and Lamb. Section 10(j) remedies are designed precisely for this circumstance.

VI. Conclusion

Petitioner thus asks the Court to issue 10(j) relief as the existing administrative record and supplemental affidavits demonstrate reasonable cause and that such relief is just and proper.

Respectfully submitted this 17th day of March, 2017.

/s/ Jessica L. Noto
JESSICA L. NOTO
Counsel for Petitioner
National Labor Relations Board – Third Region
Niagara Center Building
130 South Elmwood Ave., Ste. 630
Buffalo, New York 14202
Telephone: (716) 398-7022
Facsimile: (716) 551-4972
Email: jessica.noto@nlrb.gov
Bar Role No. 519389

cc: Raymond Pascucci, Esq. (by cm/ecf)
Tyler Hendry, Esq. (by cm/ecf)